

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

DOUGLAS R. ERWIN,

Plaintiff,

v.

LEHMAN BROTHERS BANK, FSB; et al.,

Defendants.

3:12-CV-0006-LRH-WGC

ORDER

Before the court is defendant Quality Loan Service Corporation's ("QLS") motion to dismiss (Doc. #5<sup>1</sup>) to which defendant Federal National Mortgage Association ("Fannie Mae") joined (Doc. #6). Plaintiff Douglas R. Erwin ("Erwin") filed an opposition (Doc. #8) to which QLS replied (Doc. #9).

Also before the court is defendants Lehman Brothers Bank, FSB ("Lehman") and Aurora Loan Services, Inc.'s ("Aurora") motion to dismiss. Doc. #12. Erwin filed an opposition (Doc. #14) to which defendants replied (Doc. #19).

**I. Facts and Procedural History**

In May 2005, Erwin purchased real property through a mortgage note and deed of trust executed by defendant Lehman. Erwin defaulted on the loan and defendants initiated non-judicial

---

<sup>1</sup> Refers to the court's docketing number.

1 foreclosure proceedings.

2 Subsequently, Erwin filed a complaint against defendants alleging six causes of action:  
3 (1) debt collection violations; (2) Nevada Unfair and Deceptive Trade Practices Act, NRS  
4 598.0923; (3) breach of the covenant of good faith and fair dealing; (4) NRS 107.080; (5) quiet  
5 title; and (6) fraud in the inducement and omission. Doc. #1, Exhibit A. Thereafter, moving  
6 defendants filed the present motions to dismiss. Doc. ##5, 12.

## 7 **II. Legal Standard**

8 Defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure  
9 to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state  
10 a claim, a complaint must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading  
11 standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That  
12 is, a complaint must contain “a short and plain statement of the claim showing that the pleader is  
13 entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Rule 8(a)(2) pleading standard does not require  
14 detailed factual allegations; however, a pleading that offers “‘labels and conclusions’ or ‘a  
15 formulaic recitation of the elements of a cause of action’” will not suffice. *Ashcroft v. Iqbal*, 129 S.  
16 Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

17 Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual matter,  
18 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 1949 (quoting  
19 *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows  
20 the court to draw the reasonable inference, based on the court’s judicial experience and common  
21 sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. “The plausibility  
22 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a  
23 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a  
24 defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to  
25 relief.” *Id.* at 1949 (internal quotation marks and citation omitted).

1 In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as  
2 true. *Id.* However, “bare assertions . . . amount[ing] to nothing more than a formulaic recitation of  
3 the elements of a . . . claim . . . are not entitled to an assumption of truth.” *Moss v. U.S. Secret*  
4 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951) (brackets in original)  
5 (internal quotation marks omitted). The court discounts these allegations because “they do nothing  
6 more than state a legal conclusion—even if that conclusion is cast in the form of a factual  
7 allegation.” *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) “In sum, for a complaint to survive a motion to  
8 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be  
9 plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.*

### 10 **III. Discussion**

#### 11 **A. Debt Collection Violations**

12 Pursuant to NRS § 649, it is a violation of state law to violate any provision of the federal  
13 Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692 et seq. NRS § 649.370. Here,  
14 Erwin alleges that defendants violated the FDCPA by initiating a non-judicial foreclosure without  
15 following the proper procedures for attempting to collect a debt.

16 It is well established that non-judicial foreclosures are not an attempt to collect a debt under  
17 the Fair Debt Collection Practice Act and similar state statutes. *See e.g., Hulse v. Ocwen Fed. Bank*  
18 *FSB*, 195 F. Supp. 2d 1188 (D. Or. 2002); *Charov v. Perry*, 2010 U.S. Dist. LEXIS 65798 (D. Nev.  
19 2010) (holding that recording a notice of default is not an attempt to collect a debt because the  
20 borrower already consented to allow the foreclosure trustee to record the notice upon default).  
21 Therefore, the court finds that Erwin fails to state a claim against defendants for violation of the  
22 FDCPA, and thereby NRS § 649.

#### 23 **B. Nevada Unfair and Deceptive Trade Practices Act**

24 Pursuant to NRS 598.0923 it is a deceptive trade practice to conduct business in the State of  
25 Nevada without all required state, county or city licenses. NRS 598.0923(1). Erwin alleges that  
26

1 defendants violated the statute by recording the underlying notice of default without having a state  
2 business license.

3 Initially, the court notes that the allegations against defendants are conclusory allegations  
4 that offer nothing more than a formulaic recitation of the elements of a violation. As such, they are  
5 insufficient to state a claim upon which relief can be granted. *See Moss*, 572 F.3d 969. Further,  
6 defendants did not need to be licensed to conduct business in the state of Nevada because  
7 foreclosing on real property is not an attempt to collect a debt requiring a separate license. *See*  
8 *Hulse*, 195 F. Supp. 2d 1188. Therefore, the court finds that Erwin fails to state a claim upon which  
9 relief can be granted.

### 10 **C. Breach of Good Faith and Fair Dealing**

11 Under Nevada law, “[e]very contract imposes upon each party a duty of good faith  
12 and fair dealing in its performance and execution.” *A.C. Shaw Constr. v. Washoe County*, 784  
13 P.2d 9, 9 (Nev. 1989) (quoting Restatement (Second) of Contracts § 205). To establish a claim for  
14 breach of the implied covenant of good faith and fair dealing, a plaintiff must show that: (1) the  
15 plaintiff and defendant were parties to a contract; (2) the defendant owed a duty of good faith and  
16 fair dealing to the plaintiff; (3) the defendant breached his duty by performing in a manner  
17 unfaithful to the purpose of the contract; and (4) the plaintiff’s justified expectations were denied.  
18 *See Perry v. Jordan*, 134 P.3d 698, 702 (Nev. 2006) (citing *Hilton Hotels Corp. v. Butch Lewis*  
19 *Prod. Inc.*, 808 P.2d 919, 922-23 (Nev. 1991).

20 Initially, the court notes that there is no contract between Erwin and defendants QLS and  
21 Aurora. The only contract at issue is the mortgage note originated by defendant Lehman. Therefore,  
22 the court finds that the Erwin fails to allege a sustainable claim for breach of the covenants of good  
23 faith and fair dealing as to these defendants.

24 As to defendant Lehman, Erwin alleges that Lehman breached the implied covenant because  
25 it misrepresented the initial loan agreement by not disclosing that the mortgage note would be sold  
26

1 after the loan was made and in misrepresenting the cost of credit involved in the loan agreement.  
2 However, these alleged misrepresentations occurred *before* a contract was formed. *See* Doc. #1,  
3 Exhibit A. Erwin fails to allege any facts to establish a breach of the implied covenants *after* the  
4 contract between the parties was formed. Thus, Erwin fails to allege a claim for breach of the  
5 covenants of good faith and fair dealing against defendant Lehman.

6 **D. NRS 107.080**

7 In his complaint, Erwin alleges that defendants improperly foreclosed on his property  
8 because the promissory note was severed from the deed of trust and none of the defendants hold the  
9 original mortgage note. *See* Doc. #1, Exhibit A.

10 Nevada law does not require the production of the original note before one of the statutorily  
11 enumerated parties initiates a non-judicial foreclosure. *Weingarter v. Chase Home Finance, LLC*,  
12 702 F. Supp. 2d 1276, 1280 (D. Nev. 2010). Further, there is no private right of action for tort  
13 damages under section 107.080. *See Chavez v. Cal Recon. Co.*, 2010 WL 2545006, \*2, (D. Nev.  
14 2010). The only available remedy under section 107.080 is for the court to void a trustee's sale that  
15 was undertaken in violation of the statute. As there has been no trustee's sale, or even a notice of a  
16 trustee's sale in this action, Erwin is not entitled to any remedy for defendants' alleged failure to  
17 comply with NRS 107.080. Therefore, the court finds that Erwin fails to allege a claim upon which  
18 relief can be granted.

19 **E. Quiet Title**

20 Under Nevada law, a quiet title action may be brought by someone who claims an adverse  
21 interest in property. NRS § 40.010. Here, defendants do not claim any interest in the property  
22 adverse to Erwin's interest in the property. Therefore, Erwin has no grounds to quiet title.

23 **F. Fraud**

24 "In alleging fraud or mistake, a party must state with particularity the circumstances  
25 constituting fraud or mistake." FED. R. CIV. P. 9(b). In order to meet the heightened pleading  
26

1 requirements a plaintiff must specify the time, place, and content of the misrepresentation as well  
2 as the names of the parties involved. *See Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 n.10 (9th  
3 Cir. 1999); *see also, Parnes v. Gateway 2000*, 122 F.3d 539, 549-50 (8th Cir. 1997) (requiring a  
4 plaintiff to allege the requisite who, what, where, when, and how of the misrepresentation).

5 Here, Erwin fails to allege anything more than defendants defrauded him during the loan  
6 process. There are no allegations of who failed to provide information or what information was not  
7 provided. Further, Erwin fails to specifically allege the requisite "time, place, and specific content  
8 of the false representation as well as the identities of the parties to the misrepresentations."  
9 *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004). Therefore, the court finds that  
10 Erwin's allegations are insufficient to support his claim for fraud. Accordingly, the court shall grant  
11 moving defendants' motions to dismiss.<sup>2</sup>

12  
13 IT IS THEREFORE ORDERED that defendants' motions to dismiss (Doc. ##5, 12) are  
14 GRANTED. Plaintiff's complaint (Doc. #1, Exhibit A) is DISMISSED in its entirety.

15 IT IS SO ORDERED.

16 DATED this 4th day of May, 2012.

17  
18  
19  
20  
21  
22  
23  
24  
25  
26



---

LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE

---

<sup>2</sup> The court, in granting defendants' motions to dismiss, notes that Erwin did not request leave to amend his complaint. However, even if he did request leave to amend, the court would deny the request because he has failed to make any showing that amendment in this particular case would not be futile or that he could overcome the identified pleading defects.